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No. 86-469

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLOWREAN ORANGE,

Petitioner,

v.

COLONEL PHIL K. BOMERSHEIM, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDIX

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40 pp

QUESTIONS PRESENTED

1. Whether the federal government and a federal military defendant are entitled to immunity from suit and damages under the **Feres** doctrine when the individual defendant failed to insure that a black woman cadet would receive military training in an environment free from race and sex discrimination and discriminated and retaliated against her himself when she complained of sexual harassment by one of her military instructors.

2. Whether a R.O.T.C. officer is an employee of a state university when he serves as a professor of military science under a contract between the Army Reserve Officers Training Corp and the university whereby he cannot be hired without prior approval of the university and can be removed for cause if requested by the university.

3. Assuming a R.O.T.C. officer

working as a professor of military science at a state university is an employee of that university, whether he is liable for damages under **42 U.S.C. Sec. 1983** to R.O.T.C. students when he discriminates against them on the bases of their race and sex.

4. Whether it was an abuse of discretion in dismissing the defaulting Defendant Sargeant Dicky Coons when Petitioner had set a hearing on the motion for Entry of Default Judgment.

LIST OF PARTIES

Flowrean Orange, Petitioner, Plaintiff-Appellant below.

University of Minnesota, Respondent, Defendant-Appellee below. 1/

The Regents of the University of Minnesota, Respondent, Defendant-Appellee below. 1/

Colonel Phil K. Bomersheim, Respondent, Defendant-Appellee below.

Sergeant Dicky Coons, Respondent, Defendant-Appellee below. 2/

United States Department of Army, Respondent, Defendant-Appellee below. 1/

Secretary of Army, Respondent, Defendant-Appellee below.

Army Reserve Officer Training Corps, Respondent, Defendant-Appellee below. 1/

1/ For reasons discussed infra, the only respondents directly affected by the issues in the petition are the Secretary of Army, Col. Bomersheim, and Sergeant Dicky Coons. The other defendants are named as Respondents pursuant to Rule 19.6 because of their interest in the outcome of the petition.

2/ Petitioner has made no effort to serve Sergeant Coons, because she does not know his whereabouts. He defaulted in the suit below.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Flowrean Orange, hereby petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the order filed April 17, 1986, in Orange v. University of Minnesota, et al., Eighth Circuit, No. 86-5032.

OPINIONS BELOW

Opinions and orders of the District Court filed January 9, 1985 and January 8, 1986 in Civil Action Number 3-84-957 (Renner J.), awarding summary judgment for the respondents and denying Plaintiff's Motion for Reconsideration of the court's order granting summary judgment are reproduced in the appendix which is attached to this petition **("App.")**, at pp. 19a and 28a

The opinion and order of the Court of Appeals filed April 17, 1986, in No. 86-5032 (Ross, C.J., McMillian, C.J., and Gibson, C.J.) affirming the grant of summary judgment to the defendants is reproduced at App., pp. 32a

On May 30, 1986, the Court of Appeal denied Appellant's Motion for Rehearing and En Banc and jury trial demanded and

is reproduced at App., p. 34a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to **28 U.S.C. Sec. 1254(1).**

The judgment sought to be reviewed was entered on April 17, 1986. Appellant did seek a Petition for Rehearing which petition was denied on May 30, 1986.

Appellant now files her timely Petition for Writ of Certiorari in this Court.

STATUTES INVOLVED

The **1871 Civil Rights Act, 42 U.S.C. Sec. 1983**, is reproduced at App., p. 35a

STATEMENT OF THE CASE

Petitioner Flowrean Orange seeks a Writ of Certiorari to the Eighth Circuit based on the judgment of that Circuit Court of Appeals affirming the District Court's grant of summary judgment to all of the

defendants and respondents in this case. The summary judgment motion was granted at the pleading stage on defendants' Motions to Dismiss and/or For Summary Judgment. Thus, there were never any answers filed to the First Amended Complaint.

Although Petitioner filed her affidavit in support of her opposition to the Motions to Dismiss and/or Summary Judgment, facts upon which she relies are primarily found in her First Amended Complaint.

These facts are taken in a light most favorable to the Appellant, since the standard of review and examination of the facts is the same as it was for the trial court.

The standard of review in this court is de novo review. This Court, like the trial court, "...**is required to construe all well-pleaded factual allegations of**

the non-moving party as true and to resolve all inferences which flow from these facts in his favor. Fed.R.Civ.P. 12(b)(6), (c), (h)(2); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1982)

Petitioner, Flowrean Orange, a black woman, re-enlisted on March 1, 1983 in the United States Army Reserve Officer R.O.T.C. program at the University of Minnesota, where she was a student. Petitioner had formerly been on active duty with the United States Army between May 4, 1973 and June 29, 1976 when she was honorably discharged. (App., p. 3a)

Beginning on April 21, 1983, Petitioner was continually subjected to sexual harassment caused by Respondent Coons who was Petitioner's instructor in the R.O.T.C. program at the University of

Minnesota as well as a Master Sergeant in the Army. (App., pp. 2a, 3a, 4a)

On January 12, 1984, Petitioner reported sexual harassment by Respondent Coons to the University of Minnesota and on February 5, 1984, Respondent Coons was removed from his position as an instructor in the R.O.T.C. program at the university. Petitioner also alleged that **"...as a direct result of the above-described sexual harassment"**, she was disenrolled on June 11, 1984 from the R.O.T.C. program at the university. App., p. 4a

From the documents Petitioner filed in support of her opposition to the government's Motion to Dismiss and/or Summary Judgment, it is clear that Petitioner viewed the disenrollment by Respondent Colonel Bomersheim as an act of retaliation taken against her because he had received notice that she was going

to sue him for race and sex discrimination. Petitioner also alleged that she was subjected to less favorable treatment in the processing of her contract and age waiver request based on her race by Respondent Bomersheim. (App., pp. 5a, 6a)

Petitioner also alleged that Respondent Bomersheim retaliated against her by disenrolling her in the R.O.T.C. program because she had notified him about the sexual and racial harassment she was experiencing from Respondent Coons and because she had made a demand for settlement of claims against him as well as the other respondents in this case. (App., p. 8a)

Petitioner sought declaratory and injunctive relief as well as damages against all of the respondents.

The state defendants as well as the federal defendants filed Motions to Dismiss and/or for Summary Judgment. The

only defendant who neither filed the Motion to Dismiss nor answered the Complaint was Respondent Coons in his individual capacity. The United States attorney represented all of the other federal defendants, including Sergeant Coons in his official capacity, Colonel Bomersheim in both his official and personal capacities, the United States Department of the Army, the Secretary of the Army, and the Army Reserve Officer Training Corps. The University of Minnesota and the Regents of the University of Minnesota also filed a Motion to Dismiss, represented by other counsel.

On January 9, 1985 the Honorable Robert G. Renner, United States District Court Judge for the District of Minnesota, Third Division, granted summary judgment to all of the defendants, including University of Minnesota, Regents of the

University of Minnesota, the United States Department of the Army, the Reserve Officer Training Corps, Colonel Bomersheim in both his individual and official capacities, and Master-Sergeant Dickie Coons in his official capacity only, leaving as the only defendant remaining, Respondent Coons in individual capacity only. The order granting the Motions to Dimiss and/or for Summary Judgment is found at App. , p. 19a

The Court did permit Petitioner to set a hearing on the default judgment of Respondent Coons. The hearing was continued on a number of occasions.

On January 3, 1986, Petitioner filed a Motion for Reconsideration regarding granting summary judgment. On January 8, 1986 Judge Renner denied that motion and also dismissed Respondent Coons from the case without prejudice to refile. App., 28a

On January 8, 1986, Appellant filed a timely Notice of Appeal and the United States Court of Appeal for the Eighth Circuit affirmed the granting of summary judgment to all of the defendants on April 17, 1986. Petitioner, who was proceeding on her own behalf and in forma pauperis, filed **"Plaintiff's Motion for Rehearing** and **En Banc and a Jury Trial Demanded"**. On May 30, 1986, the Court of Appeals also denied that motion. (App., p. 34a)

REASONS FOR ALLOWING THE WRIT

This case involves important issues of federal law that should be settled by this Court. The application of the **Feres** [**v. United States, 340 U.S. 135 (1950)**] doctrine to this case in view of the circumstances, that is, the federal defendants were operating under a contract that limited their employment with the

university and the petitioner was a student enrolled at the university as well as a R.O.T.C. cadet, is unjustified. Furthermore, its application to this case creates the very conditions that the doctrine was designed to avoid, the creation of an **"undisciplined Army, changing it into a mob and the weakening of military discipline."** See Bailey v. Bushkirk, **345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966).**

Furthermore, the issues raised in this case affect a very large number of individuals, since more and more women are seeking a career in the military by first enrolling in R.O.T.C. programs at state supported institutions of higher education and learning. By not permitting such women to seek redress for discrimination by their instructors

and superiors in the R.O.T.C. training program, will, in effect bar a large number of women who are seeking a professional career in the military through R.O.T.C. training on state university campuses. This, in turn, will cause the military services to lose a valuable resource for training and recruiting the best qualified officers. In fact, discrimination against female R.O.T.C. candidates hurts not only the women themselves who suffer from such discrimination, but the federal government as well. Thus, this Court ought to grant the Petition for Writ of Certiorari in this case.

1. **Why the Feres and Chappell Doctrines Should Not Be Applied to This Case.**

Before proceeding with her argument, Petitioner wishes to make clear that she does not challenge the dismissal or

granting of summary judgment to the state defendants, the University of Minnesota and the Regents of University of Minnesota, since suits against states and their instrumentalities are barred by the Eleventh Amendment of the United States Constitution. Prohibition against suit in federal court against States or their instrumentalities applies also to such suits brought under 42 U.S.C. Sec. 1981 and Sec. 1983. See, for example, Quern v. Jordan, 440 U.S. 332, 342 (1979). Furthermore, this Court also held that suits against state officials on the basis of violations of state law brought in federal courts are also barred by the Eleventh Amendment in Pennhurst State School and Hcspital v. Halderman, 457 U.S. 1131 (1984).

However, we do not concede in this petition that state officials sued in

their individual capacities cannot be sued in federal court for violation of the Plaintiff's civil rights under color of state law.

> **"It is well settled that the Eleventh Amendment does not bar a suit for damages against a state official acting in his individual capacity. [Citations omitted.] Thus, to the extent that the complaint seeks to impose individual and personal liability against the individual defendants for constitutional torts committed in the course of their employment, the Eleventh Amendment does not impose a jurisdictional bar." Werber v. State of California, No. CV 85-302-PAR (C.D.Ca., 03/29/85)**

Thus, that issue is not before this Court, since Petitioner did not allege or plead against state officials in their individual capacities in her First Amended Complaint.

Also, Petitioner does not challenge the dismissal of or grant of summary judgment to the federal defendants Department of the Army, Army Reserve Officer Training

Corp, Master-Sergeant Dickie Coons in his official capacity and Colonel Phil K. Bomersheim in his official capacity.

Furthermore, Petitioner does not raise in this petition the dismissal of the United States Department of Army, Reserve Officer Training Corps, Master-Sergeant Dickie Coons and Colonel Phil K. Bomersheim in their official capacities. The suits brought against the United States Government is generally done by naming the head of the department which is being sued. **Hawaii v. Gordon**, 373 U.S. 57 (1963)

In addition, the Department of the Army and the Reserve Officer Training Corps are not juristic persons and cannot be sued eo nomine. **See Blackmar v. Guerre,** 342 U.S. 512 (1952). **See also** Defendants' Points and Authorities in Support of Defendants' Motion to

Dismiss or in the alternative, for Summary Judgment of federal government defendants ("Fed. Memo"), p. 10, footnote 4. Thus, the only defendants below who are directly affected by this petition are the Secretary of the Army in his official capacity and Colonel Phil K. Bomersheim in his individual capacity.

The District Court dismissed the Secretary of the Army as well as Colonel Bomersheim in his individual and official capacities on the ground that the government and its agencies are immune from suit in tort for injuries to service members incident to their service, relying on **Feres v. United States**, 340 U.S. 135, 146 (1950). (App. p. 28a)

The Court also found that the **Feres** doctrine extended to constitutional violations such as the Sections 1981 and 1983 claims Petitioner made in her Amended

Complaint, relying on this Court's ruling in **Chappell v. Wallace**, 103 S.Ct. 2362 (1983). (Id.)

In dismissing Colonel Bomersheim in his official capacity, relying primarily on an Eighth Circuit case, **Brown v. United States**, 739 F.2d 362 (8th Cir. 1984), the District Court stated that **"the preservation of military discipline is at the heart of the Feres doctrine. Courts have repeatedly recognized the importance of '"[t]he peculiar and special relationship of the soldier to his superiors."' Brown v. United States, 739 F.2d at 368."** (App., p. 24a)

The Eighth Circuit's affirmance of the District Court's grant of dismissal of and/or summary judgment to at least the Secretary of the Army in his official capacity and Colonel Bomersheim in his individual capacity based on the

Feres and the Brown cases is misplaced.

The Feres doctrine was developed on the premise that superior officers should not be required to come into a civilian court to convince it

> "... of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct." United States v. Shearer, 105 S.Ct. 3039, 3044 (1985)

Furthermore, this Court also noted in Chappell v. Wallace, 462 U.S. 296, 302 (1983) that

> "'Complex, subtle, and professional decisions as to the compesition, training, ... and control of a military force are essentially

professional military judgment.'" 462 U.S. at 302, quoting Gilligan v. Morgan, 413 U.S. 110 (1973).

First, the very opposite result would obtain other than the desired one if the **Feres** and **Chappell** doctrines were to be applied to this case. Subordinate women would be threatened by undisciplined military supervisors with mob-like mentalities with such an overall weakening of discipline that

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women officers would no longer be able to serve in the military. Petitioner does not question the application of discipline in this case; rather, she challenges the failure to maintain a professional and disciplined environment so that she could continue her military training on campus that would not cause her undue stress and anxiety.

That she would weaken discipline if

> "...[she] can civilly litigate with others in the Army over the performance of another man's Army duty " Baily v. Buskirk 345 F.2d 298 (9th Cir. 1965) Cert. denied 383 U.S. 948 (1966)

is absurd under the circumstances.

This leads into the second point. Petitioner contends this Court should not apply the Feres or Chappell doctrines

to this case. As was stated in the amica brief of Working Womens' Institute filed in support of Respondent Mechelle Vinson, **Meritor Savings Bank, FSB v. Vinson, No. 84-1979** decided by this Court on June 19, 1986, at pages 14-15

> **"Sexual harassment is the most widespread problem women face in the workforce. Studies have found that 40-90% of American women have experienced one or more forms of unwanted sexual attention on the job. Women are subject to sexual harassment regardless of their age, ... or their marital status, ... whether they are blue-collar workers, ... clerical workers, ... or professionals, ..."**

Nor is it any less true for military women or as in this case, a woman student engaged in R.O.T.C. training on a state

supported university campus. Recently, this Court denied certiorari in a case in which a wrongful death action was brought on behalf of a military woman enlistee who committed suicide rather than face the continuing sexual harassment of her commander. **Stubbs v. United States, 744 F.2d 58, 60-61 (8th Cir. 1984), cert denied, 105 S.Ct. 2113 (1985)**

Third, there is another reason that the **Feres** and **Chappell** doctrine ought not be applied in this case. As already stated, Petitioner was a student and was obtaining her R.O.T.C. training in a university campus setting. There were certain understandings, rules, and expectations that Petitioner had, not only as a R.O.T.C. cadet but also as a student, and that was to be free from racial and sexual discrimination as she pursued her studies. Petitioner was not in the typical

boot camp situation whereby strict military discipline was expected. Rather, she was operating in an academic atmosphere and Colonel Bomersheim was not only her military superior, but also worked and was employed as a professor of military science at the university.

It cannot be denied by the federal respondents that there was university control over the terms and conditions of the employment of Colonel Bomersheim. In the contract which the Army signed along with the university, the Army agreed that the university could have control over the hiring and the firing of any military person who worked on the campus as an instructor or professor of military science.

The relevant portions of the contract state specifically:

"c. That no Army officer shall

> **be assigned to the Department of Military Science without prior approval of the authorities of this institution, and no Army officer will be continued on duty after the authorities have requested his relief for cause." (App. 14a**

Furthermore the Army agreed to abide by additional requirements affirming that no R.O.T.C. unit of any type would be established or maintained at the university which discriminated with respect to admission or subsequent treatment of the students on the basis of race, color, or national origin. (App. 17a) While there is no mention of sex, there is of race, as indicated, and Petitioner had alleged both sex and racial discrimination.

Thus, Petitioner had a reasonable expectation that when she enrolled as a

student at the university and became an R.O.T.C. cadet receiving military training through the university provided by Army officers of the United States Government, those Army officers would discipline and control themselves so that she was trained in an environment free from sex and racial discrimination.

Colonel Bomersheim is alleged to have been directly involved in failing to provide such an environment especially when he retaliated directly against Petitioner by dismissing her from the training program.

This issue ought to be addressed by the Supreme

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Court since as indicated above, sexual harassment of subordinate women, both in civilian workplaces as this Court acknowledged in **Meritor Bank, FSB v. Vinson, supra**, and in the military, is a major problem.

If women know that they will not be protected from the sexual harassment of their male superiors in the military, obviously they will not join, causing the military to lose a largely untapped resource of creativity, talent, and brains. It benefits both the military as well as the woman seeking the career in the military to be able to study, work, and be trained in an environment free from any form of sexual discrimination, in particular, that of sexual harassment.

We therefore ask that this Court accept certiorari on the first question presented.

2. **The Actions of Colonel Bomersheim as Done Under Color of State Law.**

Petitioner also requests that the Court accept for review the issue of whether under the circumstances of this case, Colonel Bomersheim, serving as a professor of Military Science at the University of Minnesota, a tax-supported state institution of higher learning, is liable to Petitioner under **42 U.S.C. Sec. 1983** for damages as an individually-sued defendant.

This Court has not yet passed upon the question of whether a federal officer who cooperates with state officials in some fashion in depriving a citizen of her federal constitutional rights is liable to that individual under **42 U.S.C. Sec. 1983** and

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its jurisdictional statute, **28 U.S.C. Sec. 1343.** At least one circuit, Second Circuit, has found such liability against federal officials in **Kletschka v. Driver, 411 F.2d 436 (2nd Cir. 1969)** and in **English v. Huntington, 448 F.2d 319 (2nd Cir. 197).** In this case, Petitioner has alleged direct involvement by Colonel Bomersheim in the racial and sexual discrimination she complains of. (App., pp. 5a & 6a Furthermore, she complains specifically of direct retaliation by Colonel Bomersheim by removing her from the R.O.T.C. training program after he learned that he might be sued if he did not enter into a settlement agreement with Petitioner and her then attorney of record. (Id.) (App., p. 8a)

The federal defendants conceded or at least did not argue the application of the **Brown v. United States, 739 F.2d**

362 (8th Cir. 1984), case to the action complained of in the First Amended Complaint of Master-Sergeant Coons. Yet, while the federal defendants did not apparently question the supervisory authority and control Respondent Coons obviously had over Petitioner as a cadet in the R.O.T.C. program, and yet conceded that as an individually-sued defendant, he could be liable to Petitioner under the **Brown** case, they did distinguish Colonel Bomersheim on the grounds that he was the superior of Petitioner and therefore, unlike Defendant Coons, the **Brown** cased did not apply to him. This is inconsistent reasoning and furthermore ignores the allegations made in the complaint which directly attributed to Colonel Bomersheim, not only acts of race and sex discrimination, but also an act of retaliation by removing her

from the training program when he learned that he might be sued. (App., p. 8a)

It is clear from the Amended Complaint and from the contract, found in the attached Appendix beginning at pages 1A and 12A, that Colonel Bomersheim could not have accomplished what he did against Petitioner were it not for his relationship with the university. It is also as indicated above, beyond peradventure that the university did maintain ultimate controls over the terms and conditions of his employment, by having the right to approve his hiring and the right to terminate should they be able to demonstrate cause for his removal.

Thus, the harsh rule of the **Feres** and **Chappell** doctrines should be mitigated by the circumstances as outlined in this section. Colonel Bomersheim could not have done what he did to Petitioner without authority

of state law as vested in him through the contract his employer, the Army, entered into with the University of Minnesota.

3. The Dismissal of Defendant Dicky Coons as an Abuse of Discretion of the Court.

Judge Renner's decision on December 18, 1985, to dismiss Master Sergeant Dicky Coons is an abuse of discretion and should be reversed.

Dismissal for failure to proceed is a drastic step against Petitioner and, in effect, terminated Plaintiff's constitutional and tort claims against Defendant Dicky Coons, notwithstanding the fact that the dismissal was "without prejudice". A dismissal "without prejudice" as to Defendant Dicky Coons on December 18, 1985, bars Plaintiff's claims against Defendant Dicky Coons by

the statute of limitations.

This court ruled in **Wilson v. Garcia**, **105 S.Ct. 1938 (1985)** that state personal injury statutes of limitations were to be applied to all **Section 1983** claims. Clearly, under Minnesota's statute of limitations for personal injury, the claims against Defendant Dicky Coons will now be time barred.

This drastic result to Plaintiff is entirely out of proportion to any recognizable interest of the court or the Defendant Dicky Coons. Plaintiff had obtained an order for service of the Motion for Entry of Default Judgment and had completed publication. The hearing was delayed primarily because Petitioner had no attorney and then became ill. Indeed, Defendant Dicky Coons has suffere no detriment at all caused by Plaintiff's failure to proceed to obtain the default judgment against him. We ask the court

to grant the Petition on this issue.

CONCLUSION

The importance of the issues presented, the impact of the issues on military women in educational institutions, the significance of these claims to the business of the federal courts, all warrant consideration of the case by this Court.

We respectfully request that this Court grant the petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

DATED AT
Grover City, CA
this 24th day of
September 1986

Respectfully submitted,

Patricia J. Barry

PATRICIA J. BARRY